79-514

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 79-1156

BURTON L. SINAGUB, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEAL - SEVENTH CIRCUIT

BURTON L. SINAGUB
6027 Gentle Knoll
Dallas, Texas 75248

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V.

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PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

Burton L. Sinagub, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 18, 1979.

INDEX

TABLE OF CASES

STATUTE AND CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and printed in Appendix A hereto, infra, page 14. The judgment of the United States District Court for the Western District of Wisconsin is printed in Appendix A hereto, infra, page 15.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, infra, page 16) was entered on June 18, 1979. A timely petition for rehearing was denied on September 20, 1979 (Appendix A, infra, page 17). The jurisdiction of the Supreme Court is invoked under 28 USCS §1254.

QUESTIONS PRESENTED

Whether Rule 11(c) of the Federal Rules of Criminal Procedure, is to be interpreted literally and requires strict compliance with the requirements thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in part, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime ... nor be deprived of life, liberty, or property, without the process of law ...

and Rule 11(c) Fed. Rules Crim. Proc., 18 U.S.C.A., which reads, in part, as follows:

> "(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the

right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT OF THE CASE

This is an appeal from a criminal conviction wherein the defendant on the 9th day of November, 1978, entered a plea of guilty to two counts of fraud by wire, violation of 18 U.S.C. §1343. On February 2, 1979, the defendant was sentenced by the Honorable James E. Doyle, to two terms of thirteen (13) months in prison, the terms to be served concurrently.

On February 9, 1979, defendant filed a Notice of Appeal from the final judgment of conviction entered at the time of sentencing, the basis of which appeal is predicated on the contention that the Trial Judge did not comply with the explicit requirements of Rule 11(c), Fed. Rules Crim. Proc., 18 U.S.C.A.

THE EVIDENCE

Perusal of the trial record reveals that the trial judge failed to:

1. Personally advise and inform the defendant that if he pleads guilty or nolo contendere, the Court may ask him questions about the offense to which he had pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement, as required by Rule 11(c)(5).

2. Personally inform the defendant properly as to the maximum possible penalty

provided by law, as required by Rule 11(c)(1).

3. Personally advise the defendant that at a trial by jury he had the right to the assistance of counsel, as required by Rule 11(c)(3).

The record of that hearing held on November 9, 1978, at which the defendant entered his plea of guilty fails to reflect that the trial judge personally advised the defendant of the maximum punishment for the offense(s), as required by Rule 11(c)(1), Fed. Rules Crim. Proc., 18 U.S.C.A. The following colloquy is reflected by the record with respect to the trial judge's attempt to advise the defendant of the maximum punishment for the offense with which he is charged:

> THE COURT: Mr. Franke, what is the maximum penalty to which the defendant might be subject if he were to be convicted of Counts IV and V of the indictment?
>
> MR. FRANKE: Your Honor, upon conviction for Courts IV and V charged in the indictment, the defendant would be subject to a term of incarceration not to exceed ten years, or a fine not

> not to exceed $2,000, or both such terms of imprisonment and fine.
>
> THE COURT: On each count or on the combination?
>
> MR. FRANKE: On both counts, Your Honor. That would be the combined maximum for both counts.
>
> THE COURT: So five years or $1,000 or both on each of the two counts?
>
> MR. FRANKE: Yes, Your Honor.
>
> THE COURT: Thank you.
> (Tr. 4, November 9, 1978, Doc. No. 47)

The trial judge subsequently again attempted to advise the defendant of the maximum punishment for his offense(s), but the trial record reveals that the trial court failed to state the correct maximum punishment wherein the following dialogue took place:

> (THE COURT): Mr. Sinagub, do you understand that if I accept the pleas of guilty to Counts IV and V, that you could be subjected to penalties up to and including imprisonment for as long as five years on each of the two counts or fined as much as $2,000 on each of the two counts or subjected both to the maximum term of imprisonment and the maximum fine on each of the two counts?

MR. YOUNGERMAN: May I interject? I believe the fine is $1,000 each, a maximum of $1,000 on each count.

THE COURT: Did I just misspeak? Thank you.

Mr. Sinagub, I'd like then to ask that question again. Do you understand that if I accept the pleas of guilty to Counts IV and V that on each of those counts you could be subjected to imprisonment for as much as five years and fined as much as $5,000?

DEFENDANT SINAGUB: Yes.

(Tr. 10-11.)

The record reflects that there was great confusion in the Court's mind as to the maximum punishment possible, and that on the last attempt by the Court to personally advise the defendant as to the maximum punishment possible, the Court again misstated the maximum punishment possible.

PERTINENT RULINGS

In McCarthy v. United States, 394 U.S. 459(1969), the Supreme Court, pursuant to its supervisory power, held that there must be strict compliance with Rule 11 and that "any

noncompliance with Rule 11 is reversible error." McCarthy v. United States, supra at 464 N.9. Effective December 1, 1975, Rule 11 of the Federal Rules of Criminal Procedure was amended by providing that trial judges accepting guilty pleas "must address the defendant personally in open court," inform him of certain constitutional rights, certain consequences of his plea, and the nature of the charges to which he is pleading. Under those amendments, the trial judge must also determine that the defendant understands what he is told. In United States v. Aldridge, 553 F.2d 922 (Fifth Cir. 1977), the Court held that the adoption of the new amendments did not alter the rule that "compliance with Rule 11 must be literal." Moreover, the United States Court of Appeals for the Second Circuit, in that case styled United States v. Journet, 554 F.2d 633(1976), stated "we now hold that, as a minimum, before accepting a guilty plea each district judge must personally inform the defendant of

each and every right and other matter set out in Rule 11. Otherwise, the plea must be treated as a nullity." U.S. v. Journet, supra at page 636. The Fifth Circuit Court of Appeals in U. S. v. Adams, 566 F.2d 962 (1978), held that the trial judge did not personally inform the defendant that he "has a right to the assistance of counsel, the right to confront ... witnesses against him, and the right not to be compelled to incriminate himself. Rule 11(c)(3) requires that a defendant be personally informed of those three rights."

The record failed to reflect that the trial judge personally advised the defendant of the maximum punishment for the offense, as required by Rule 11(c)(1).

The United States Court of Appeals, Fifth Circuit, in Government of the Canal Zone v. Tobar, 565 F.2d 1321(1978), asserted that where the District Court failed to comply with procedural rule requiring that a defendant pleading guilty

be advised of the maximum sentence allowed by law in that defendant, when pleading guilty to charge of burglary enhanced by Canal Zone habitual criminal statute, was erroneously advised that the maximum allowable sentence was fifteen years when it was actually life imprisonment, it was necessary that the defendant be allowed to plead anew.

In United States v. Hart, 566 F.2d 977(1978) the Fifth Circuit Court of Appeals held that the failure of the trial judge to personally inform the defendants of the constitutionally protected rights they would waive if their guilty pleas were accepted violated requirements of Rule 11 and required reversal of conviction and remand for entry of a new plea, even though trial judge had allowed the Assistant United States Attorney to provide the required information and even if trial judge had personally adked the defendant whether he understood prosecutor's remarks and waived his rights.

In U. S. v. Lincecum, 568 F.2d 1229(1978), again the Fifth Circuit affirmed that a defendand is entitled to plead anew if the District Court accepts his guilty plea without fully adhering to the procedures required for by Rule 11 of the Federal Rules of Criminal Procedure.

United States Court of Appeals, Second Circuit, adopts the same strict view of the requirements of Rule 11, and in U. S. v. Alejandero, 569 F.2d 1200(1978), held that where the defendant has been erroneously advised as to the maximum punishment possible, his guilty plea would be vacated and the defendant would be given an opportunity to plead again to the indictment. The Second Court of Appeals again affirmed this strict view of the requirements of Rule 11 in that case styled U. S. v. Palter, 575 F.2d 1951(1978), wherein the Court held that the failure of the trial court to advise the defendants that they were subject to

mandatory special parole terms which could last as long as lives rendered the plea proceedings a nullity.

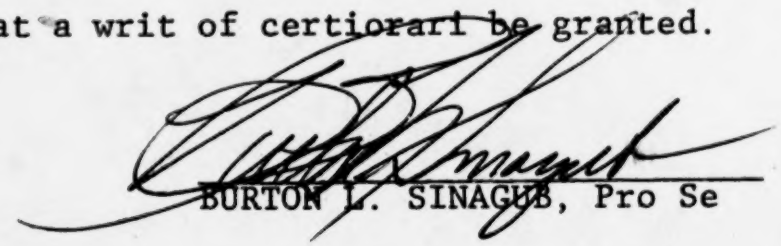
REASON FOR GRANTING WRIT

An apparent discrepancy in the understanding and application of Rule 11, Fed. Rules Crim. Proc., 18 U.S.C.A., exists between the various Circuits of the United States Courts of appeal. This dichotomy is reflected in the divergent views of the Second and Fifth Circuit Courts of Appeal, which Courts of Appeal adhere to a "literal and strict compliance" standard, with the Seventh, Ninth and Tenth Circuit Courts of Appeal, which adhere to a "fundamental error" standard, as reflected in the following opinions: United States v. Bachner, 517 F.2d 589(7th Cir. 1975); Evers v. United States , 579 F.2d 71 (10th Cir. 1978); United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978), and United States v. Hamilton, 568 F.2d. 1302 (9th Cir. 1978).

This conflict in the standard of review to be employed by the Courts in reviewing pleas of guilty taken under Rule 11, Fed. Rules Crim. Proc., 18 U.S.C.A. should be resolved in order to establish a uniform approach to application of the foregoing referenced procedural rule.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.



BURTON L. SINAGUB, Pro Se

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Submitted: June 18, 1979)

JUNE 18, 1979.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	Appeal from the United States District Court for the Western District of Wisconsin
NO. 79-1156 vs.	)	No. 78-CR-38-1
BURTON L. SINAGUB, Defendant-Appellant	)	JAMES E. DOYLE, Judge

O R D E R

Appellant's counsel, whose request filed June 15, 1979 for a continuance had been denied, did not appear. The Court concluded that oral argument was unnecessary, and on the basis of the briefs and record, announced in open court, without hearing argument, that the Court concluded the judgment appealed from must be AFFIRMED.

Appellant's claims were disposed of as follows.

Since Appellant was not called upon to make statements under oath, and did not do so, omission of warning of possible perjuring proseuction (sic) is not a basis for reversal.

The district court did not fail to advise appellant of his right to assistance of his counsel at trial.

The Judge's overstatement of the maximum possible fine was not reversible error, particularly since the matter was elsewhere accurately stated.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

VERDICT 2-2-79

UNITED STATES DISTRICT COURT for
THE WESTERN DISTRICT OF WISCONSIN

United States of America vs.

DEFENDANT: BURTON L. SINAGUB Docket No. 78-CR-38-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — Month: February, Day: 2, Year: 1979

COUNSEL: [] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL James Youngerman (Name of counsel)

PLEA: [X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [] NOLO CONTENDERE [] NOT GUILTY

FINDING & JUDGMENT: There being a finding of [] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Knowingly transmitting certain sounds by wire in interstate commerce, in violation of 18 USC §1343, as charged in the Indictment filed July 13, 1978.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sifficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

In Docket No. 78-CR-38: As to Count IV, IT IS ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of 13 months.

SPECIAL CONDITIONS OF PROBATION

As to Count V, IT IS ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of 13 months. The sentence on Count V is to run concurrently with the sentence on Count IV.

IT IS FURTHER ORDERED that a stay of execution of the sentence of imprisonment is granted until March 5, 1979.

ADDITIONAL CONDITIONS OF PROBATION

IT IS ORDERED that the defendant voluntarily surrender himself to the Attorney General or his authorized representative between the hours of 10:00 AM and 12 Noon on Monday, March 5, 1979, at such institution as may be ordered by the Court by further order entered prior to said day and hour. IT IS ORDERED that bail is continued until March 5, 1979.

IT IS ORDERED that the Attorney General or his authorized representative are hereby designated as officers of the court for the purpose of the required appearance of the defendant on March 5, 1979.

IT IS ORDERED that the Governments motion to dismiss Counts I, II, III is granted.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

SIGNED BY

[X] US DISTRICT JUDGE
[ ] US Magistrate

/s/ James E. Doyle

Date February 2, 1979

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer

CERTIFIED AS A TRUE COPY ON

THIS DATE 2/5/79

By /s/Virginia Corey

( )Clerk
(X)Deputy

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 18, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 79-1156 VS.	)	
BURTON L. SINAGUB, Defendant-Appellant.	)	No. 78-CR-38 James E. Doyle, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

SEPTEMBER 20,1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Western District of Wisconsin No. 78-CR-38 JAMES E. DOYLE, Judge.
NO. 79-1156 VS.	)	
BURTON L. SINAGUB, Defendant-Appellant.	)	

O R D E R

Treating the "Petition for Rehearing In Banc" as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing in banc under Rule 35, F.R.A.P., no judge in regular active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing in banc is hereby, DENIED.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this the 27 day of September, 1979, a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, was placed in the U. S. mail, postage pre-paid, to Mr. John Franke, Asst. U. S. Attorney, P. O. Box 112, Madison, Wisconsin 53701.

Burton L. Sinagub